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No. 04-___

IN THE

Supreme Court of United States

EAGLES, LTD., DON HENLEY, GLENN FREY, EAGLES TOURING CO., EAGLES MERCHANDISING CO., EAGLES RECORDING CO., N.E.A., LLC, AND IRVING AZOFF,
Petitioners,

v.

DON FELDER,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, is the question whether a party waived its right to compel arbitration through litigation conduct presumptively decided by the arbitrator, as held by the Eighth Circuit and the highest courts of two states, or by the court, as the court below and the First and Fifth Circuits have concluded?

PARTIES TO THE PROCEEDING

Petitioners, who were defendants in the Superior Court of California and real parties in interest in the California Court of Appeal, are Eagles, Ltd., Don Henley, Glenn Frey, Eagles Touring Co., Eagles Merchandising Co., Eagles Recording Co., N.E.A., LLC, and Irving Azoff. Respondent is Don Felder, who was the plaintiff in the Superior Court and petitioner in the California Court of Appeal.

CORPORATE DISCLOSURE STATEMENT

Eagles, Ltd., Eagles Touring Co., Eagles Merchandising Co., and Eagles Recording Co. are closely held corporations. N.E.A., LLC is a California limited liability corporation. No publicly held company holds more than 10% of the stock in any of these entities. No publicly held corporation or publicly held entity has any interest in the outcome of this litigation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the California Court of Appeal in this case.

OPINIONS AND JUDGMENTS BELOW

The order of the Supreme Court of California denying review is reported at 2005 Cal. LEXIS 3169 (Cal. 2005) and reprinted in the Appendix ("App.") at 14a. The opinion of the Court of Appeal (App. 1a) and the judgment of the Superior Court (App. 12a) are unreported.

JURISDICTION

The opinion of the California Court of Appeal was issued on December 9, 2004. The Supreme Court of California denied the petitioners' timely petition for certiorari on March 23, 2005. This Court has jurisdiction to review the judgment of the California Court of Appeal pursuant to 28 U.S.C. § 1257. *See Southland Corp. v. Keating*, 465 U.S. 1, 6 (1984) (state-court decision denying motion to compel arbitration is "final" for purposes of Supreme Court review under 28 U.S.C. § 1257).

STATUTE INVOLVED

The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, provides in pertinent part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

STATEMENT OF THE CASE

At issue in this case is the scope of an arbitrator's authority to decide procedural questions of arbitrability. The court below ruled that petitioners are not entitled to compel arbitration under an agreement governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), because they waived their right to arbitrate through inconsistent litigation conduct. In holding that it is for the court and not the arbitrator to decide that waiver issue, the decision below adds to a significant conflict among the federal courts of appeals and state supreme courts – a conflict recently acknowledged by the First Circuit. *See Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 10 (2005). It also runs contrary to a trio of recent decisions in which this Court, consistent with the strong pro-arbitration policy of the FAA, has held that arbitrators, and not courts, should decide "procedural" questions of arbitrability, including "allegations of waiver, delay, or a like defense to arbitrability." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (internal quotation omitted); *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *PacificCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003). This Court should grant review to resolve the conflict of authority and vindicate the FAA's strong policy in favor of arbitration.

1. Petitioners Don Henley and Glenn Frey are the founding members of the Eagles, the well-known rock band; petitioner Irving Azoff is the band's long-time manager. Respondent Don Felder was not an original member of the Eagles, but played with the band as a guitarist in the 1970s and again when the band reunited in the 1990s for its successful *Hell Freezes Over* album and tour. On August 31, 2000, the band members, including Felder, entered into an agreement setting forth their respective rights and obligations with regard to each other and with regard to the national and inter-

national sale of a four-CD "box set" collection of songs from throughout the band's history (the "2000 Agreement"). Paragraph 6 of the 2000 Agreement provides that "any and all disputes arising out of or in connection with this agreement shall be decided by binding arbitration." App. 26a.

2. In early 2001, the Eagles decided to reunite again, this time without Felder. Felder responded to the unanimous decision of his former band-mates by filing a complaint in California state court against petitioners Henley, Frey and Eagles, Ltd. in February 2001, seeking involuntary dissolution of Eagles, Ltd. and an accounting. App. 3a. Felder filed a second complaint in May 2001 against the same defendants and related Eagles entities (the "Eagles Defendants") alleging, *inter alia*, wrongful termination and breach of contract. The two actions against the Eagles Defendants were consolidated and petitioners answered the consolidated complaint, raised affirmative defenses, and participated in discovery. *Id.* The parties stayed all litigation activity for eight months in 2003 to pursue settlement. In November 2003, Felder abandoned the settlement negotiations and hired new counsel.

In January 2004, Felder filed a new $40 million complaint against Azoff, the band's manager, who was not a party to Felder's original lawsuits. Felder obtained consolidation of his new complaint with his old suits against the Eagles Defendants, and then dismissed what had been the primary and unifying claim of his old suits – dissolution of Eagles, Ltd. Felder's new complaint significantly changed his theory of the case, asserting new allegations of conspiracy and other wrongful conduct against Azoff and the Eagles Defendants in connection with the negotiation and performance of the 2000 Agreement.

As a new defendant, Azoff obtained a continuance to allow himself adequate time to evaluate and prepare a defense. App. 3a-4a. In June 2004, he answered Felder's latest complaint and raised affirmative defenses. Azoff responded to

discovery requests by Felder, but did not conduct any affirmative discovery of his own. App. 12a.

In August 2004, Azoff moved the state trial court, under the FAA, to compel arbitration of the consolidated actions. App. 4a; *see Southland Corp. v. Keating*, 465 U.S. 1, 10-17 (1984) (FAA governs in state as well as federal court). Felder's new claims against all of the defendants, Azoff argued, revolved around negotiation and purported breach of the 2000 Agreement. Accordingly, they "ar[ose] out of or [were] in connection with" the 2000 Agreement under the terms of section 6. App. 4a. The Eagles Defendants joined in Azoff's motion, arguing that Felder's case, as "newly configured," now fell within the terms of the 2000 Agreement's arbitration clause. *Id.*; *see Gilmore v. Shearson/American Express Inc.*, 811 F.2d 108, 113 (2d Cir. 1987) (arbitration may be allowed even after active litigation where plaintiff changes "scope or theory" of original claims); *Iowa Grain Co. v. Brown*, 171 F.3d 504, 509-10 (7th Cir. 1999) (same). Felder opposed the motion on the ground that petitioners had waived the right to arbitrate by initially defending against his claims in litigation. App. 5a.

3. On September 20, 2004, the California trial court granted petitioners' motion to compel arbitration, thus holding that Felder's claims against Azoff and the Eagles Defendants were subject to arbitration under the 2000 Agreement. The court rejected Felder's waiver defense, finding that Azoff had timely filed his motion to arbitrate "as soon as his counsel were up to speed in the case," and that Felder had not been prejudiced by the initial litigation because Azoff had taken "no action to undermine or impair [Felder's] ability to take advantage of the benefits and efficiencies of arbitration." App. 5a. That result, the court concluded, was consistent with the "strong public policy in favor of arbitration." *Id.*

4. On writ of mandate, the California Court of Appeal

reversed. The Court of Appeal did not dispute the trial court's holding that all of Felder's claims were subject to arbitration under the 2000 Agreement. Instead, it ruled that petitioners had waived their right to compel arbitration by participating in the litigation initiated against them by Felder.

Before the Court of Appeal – as before the trial court – petitioners argued that any question of waiver was for the arbitrator to decide, pursuant to this Court's decision in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). The Court of Appeal rejected that position, holding that "[i]t is the court, not the arbitrators, that determines the issue of waiver of arbitration by litigation conduct." App. 6a. The court acknowledged *Howsam*'s statement to the contrary, providing that "the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability." *Id.* (quoting *Howsam*, 537 U.S. at 84) (internal quotation omitted). The court went on to find, however, that the *Howsam* rule does not apply to the issue of waiver by litigation conduct, which is "more properly addressed by the court." App. 7a. That carve-out from *Howsam*, the court reasoned, was compelled by its own prior case law distinguishing between litigation-related and non-litigation-related waiver claims. App. 6a (relying on *Omar v. Ralphs Grocery Co.*, 118 Cal. App. 4th 955 (2004)).

As to the waiver issue itself, the court held that the trial court erred in its assessment of the litigation conducted below and the impact of that litigation on Felder's rights. Unlike the trial court, the appellate court found that the litigation conduct of both Azoff and the Eagles Defendants had been "inconsistent with the right to arbitrate," App. 9a, and that Felder was "affected, misled or prejudiced" by that conduct. *Id.* (citation & quotation omitted).

5. The Supreme Court of California denied petitioners' petition for discretionary review on March 23, 2005.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT IN THE COURTS OVER WHETHER WAIVER BY LITIGATION CONDUCT IS PROPERLY DECIDED BY THE ARBITRATOR OR BY THE COURT.

The decision below adds to a substantial and growing conflict among the federal circuit and high state courts regarding an arbitrator's presumptive authority under the FAA to determine issues of waiver by litigation conduct. This Court has addressed the issue of arbitration waiver once already, directing that absent a contrary specification in the arbitration agreement, "allegations of *waiver*, delay, or a like defense of arbitrability" are matters for the arbitrator, and not the court, to decide. *Howsam*, 537 U.S. at 84 (emphasis added). But despite that guidance, the issue remains a source of widespread confusion in the lower courts. The Court should take this opportunity to clarify that *Howsam* means what it says, and that *all* waiver issues are presumptively for the arbitrator to decide.

1. The issue in *Howsam* was whether a court or an arbitrator should decide a claim that arbitration was barred by an alleged failure to comply with an arbitral limitations period. 537 U.S. at 81. The Court explained that in light of the strong federal policy favoring arbitration, "procedural questions" of arbitrability "are presumptively *not* for the judge, but for an arbitrator, to decide." *Id.* at 84 (emphasis in original). The time-limit rule at issue in *Howsam*, the Court concluded, fell within the "procedural" category of issues reserved to the arbitrator – primarily because it so "closely resemble[d]" the "waiver" and "delay" issues already deemed to fall within the arbitrator's purview. *Id.* at 85 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

2. In the wake of *Howsam*, three federal circuit or high state courts have concluded that the issue of waiver by litiga-

tion conduct is to be decided by the arbitrator and not by the court. *See Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003); *Woodland Limited P'ship v. Wulff*, 868 A.2d 860, 865 (D.C. 2005); *Guam Housing & Urban Renewal Auth. v. Pac. Superior Enter. Corp.*, 2004 Guam 22, ¶ 40;[1] *see also Int'l River Ctr. v. Johns-Manville Sales Corp.*, 861 So.2d 139, 144 (La. 2003) (applying *Howsam* to conclude that for arbitration agreements governed by state statute similar to the FAA, "waiver is reserved for the arbitrator to decide").

The reasoning of those courts is straightforward. A plain reading of *Howsam*, they conclude, resolves the issue and dictates that a defense of waiver by litigation conduct proceed to arbitration. *See* 328 F.3d at 466; 868 A.2d at 865; 2004 Guam at ¶ 40. Moreover, the mere fact that "the question of waiver . . . will turn on the degree and nature of [the claimant's] participation in the court proceeding" does not trump the rule announced in *Howsam*. 868 A.2d at 865. At least where the parties have entered into a broad arbitration agreement, binding themselves to arbitrate "any dispute arising under or related to" that agreement, the presumption remains that the arbitrator will decide the procedural question of waiver by litigation conduct. *Id.*[2]

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[1] Congress' 2004 amendments to the Organic Act of Guam, 48 U.S.C. § 1424, which governs Guam's judicial system, eliminated language that had provided for Ninth Circuit review of the decisions of Guam's Supreme Court and instead made the Supreme Court of Guam the equivalent of any other state supreme court for purposes of certiorari review. *See* Act of Oct. 30, 2004, Pub. L. No. 108-378, 118 Stat. 2206.

[2] In a similar context, the Second Circuit has held that the arbitrator, rather than the court, should decide whether a party has waived the right to arbitrate through pre-arbitration conduct purportedly repudiating the arbitration agreement. Like the courts discussed above, the Second Circuit – considering the issue after this Court remanded the case for further consideration in light of *Howsam* – concluded that *Howsam* is properly read to require that *all* procedural defenses to arbitrability, including waiver, estoppel, and delay, be decided by the arbitrator. *See Mulvaney*

3. Those holdings – which reflect a proper and straightforward reading of *Howsam* and the FAA – stand in sharp contrast to the decision below and to recent decisions by the First and Fifth Circuits holding that allegations of waiver by litigation conduct are to be decided by the court, not the arbitrator. *See Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 14 (1st Cir. 2005) (specifically acknowledging conflict); *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 Fed. Appx. 462, 464 (5th Cir. 2004) (unpublished); *see also Republic Ins. Co. v. PAICO Receivables LLC*, 383 F.3d 341 (5th Cir. 2004) (deciding merits of waiver-by-litigation defense). Like the California Court of Appeal, the First and Fifth Circuits have concluded that allegations of waiver by litigation conduct should be treated as an exception to the rule established by *Howsam*, and presumptively decided by courts rather than arbitrators.[3]

None of those decisions is anchored in a reading of *Howsam*, the FAA, or any general principle of arbitration law. Instead, they turn primarily on what the First and Fifth Circuits deem an "important policy" justification: that courts are better positioned than arbitrators to assess the litigation conduct put at issue by claims of litigation waiver. *See* 402 F.3d at 13 (relying on "comparative expertise" of courts in identifying "abusive forum shopping"); 97 Fed. Appx. at 464 (because waiver "depends on the conduct of the parties before the district court," court is in "best position to decide"

Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38, 351 F.3d 43, 46 (2d Cir. 2003).

[3] Several other courts have come to the same conclusion implicitly, by deciding the litigation waiver issue on the merits without expressly considering whether the issue should instead be arbitrated. *See Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 598 (3d Cir. 2004); *Highlands Wellmont Health Network v. John Deere Health Plan*, 350 F.3d 568, 574 (6th Cir. 2003); *Carbajal v. H&R Block Tax Servs.*, 372 F.3d 903 (7th Cir. 2004) (affirming district court decision reaching merits of litigation-waiver issue); *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 586 S.E.2d 581, 585-86 (S.C. 2003).

the issue).

4. Not surprisingly, the clear conflict among the federal courts of appeals and high state courts is mirrored by substantial confusion in the lower courts, where there is also no consensus on the role of the arbitrator in deciding issues of waiver by litigation conduct. *Compare Bellevue Drug Co. v. Advance PCS*, 333 F. Supp. 2d 318, 324 (E.D. Pa. 2004) ("Since *Howsam*, the majority of the Courts of Appeal to have considered the issue in precedential opinions have concluded that waiver is an issue that presumptively should be presented to the arbitrator in the first instance.") (citing cases) and *Housh v. Dinovo Invs., Inc.*, No 02-2562, 2003 U.S. Dist. LEXIS 3707, at *32-33 (D. Kan. 2003) (under *Howsam*, "the Court must apply the presumption that the waiver issue should be decided by an arbitrator") *with Carbajal v. Household Bank, FSB*, No. 00-C-0626, 2003 WL 22159473, at *9 (N.D. Ill. Sept. 18, 2003), *aff'd* 372 F.3d 903 (7th Cir. 2004) (issue of waiver by litigation conduct should be submitted to the court).

In short, the conflict identified by the First Circuit in *Marie* persists and has only grown deeper as courts continue to adopt sharply conflicting interpretations of governing federal law and this Court's decision in *Howsam*. The Court should grant a writ of certiorari to resolve this clear conflict.

II. THE DECISION BELOW CONFLICTS WITH THE STRONG PRO-ARBITRATION POLICY EMBODIED IN THE FEDERAL ARBITRATION ACT AND RECOGNIZED BY THIS COURT.

1. As this Court has recognized repeatedly, the Federal Arbitration Act evinces Congress' clear intent to pursue a liberal public policy favoring arbitration and to "reverse the longstanding judicial hostility to arbitration agreements." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000); *see also Keating*, 465 U.S. at 10 ("In enacting [the FAA], Congress declared a national policy favoring arbitration.").

Under the FAA, agreements to arbitrate are to be enforced as written, and courts must refrain from resolving any question that the parties have agreed to arbitrate. *See* 9 U.S.C. § 2; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995). Moreover, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25; *see also Mastrobuono*, 514 U.S. at 62.

Consistent with that pro-arbitration policy, this Court has held repeatedly that where the parties have entered into a written agreement to arbitrate, all disputes and issues relating to that agreement must be decided by the arbitrator, not the court. A court's role in arbitration disputes is limited to deciding two threshold "questions of arbitrability": whether there is a valid and enforceable arbitration agreement and whether the arbitration agreement covers the dispute at issue. *See Howsam*, 537 U.S. at 84; *Green Tree*, 539 U.S. at 445. Once it is resolved that the parties have indeed agreed to arbitrate, then any "procedural" questions – even if they are "potentially dispositive gateway question[s]," the resolution of which "will determine whether the underlying controversy will proceed to arbitration on the merits" – are for the arbitrator and not the court to decide. *Howsam*, 537 U.S. at 83-84. And that category, as the Court explained in *Howsam*, includes "allegation[s] of waiver, delay, or a like defense to arbitrability." *Id.* at 84 (quoting *Moses H. Cone*, 460 U.S. at 24-25).

The Court applied this principle in a trio of cases decided in the October 2002 Term, unequivocally affirming the broad scope of authority given to arbitrators and rigorously policing the concomitant limits on court authority. In *Howsam*, as noted earlier, the Court considered a claim that arbitration was barred by failure to comply with a limitations period and held that, like an allegation of waiver, such claim was for an arbitrator to decide. 537 U.S. at 85. In *Green Tree*, the issue

was whether classwide relief was available in arbitration. Again, the Court held that the question did not "fall into the limited circumstances" over which courts have authority, because it involved "neither the arbitration clause's validity nor its applicability to the underlying dispute." 539 U.S. at 445. Accordingly, the availability of classwide relief is to be decided by the arbitrator and not the court. *Id.* Finally, in *PacificCare*, the Court applied the *Moses H. Cone* presumption in favor of arbitration to hold that the availability of treble damages under an arbitration agreement – even where it is the key to the agreement's enforceability – is for the arbitrator to decide. 538 U.S. at 407 n.2.

2. The decision below is contrary both to the broad pro-arbitration policy of the FAA and to the precedents of this Court applying that policy. The California trial court recognized that the "strong public policy in favor of arbitration" militates in favor of sending *all* waiver issues to arbitration. App. 13a. The California Court of Appeal, on the other hand, failed to apply or even to address the *Moses H. Cone* rule that all doubts are to be resolved in favor of arbitration. *Cf. PacificCare*, 538 U.S. at 407 n.2 (applying *Moses H. Cone* presumption in favor of arbitration). And the decision below cannot be reconciled with the *Howsam/Green Tree/PacificCare* line of cases, which collectively establish a firm rule that *all* issues related to arbitration, excepting only those going to the validity of an arbitration agreement or its application to a particular dispute, are to be decided by the arbitrator and not the court. Nothing in any of those decisions even suggests a special exception for the issue of litigation waiver – a remarkable oversight if the Court actually had intended such a radical and important departure from its otherwise applicable law.

Nor is there any legitimate policy reason for departing here from the general rule that "procedural" arbitrability, including waiver, is for the arbitrator to decide. As *Howsam*

explains, the "narrow exception" to federal arbitration policy that allows courts to decide threshold questions relating to the validity and scope of arbitration agreements is intended only to safeguard the intent of the contracting parties. 537 U.S. at 83 (court decides narrow questions of validity and applicability so that parties are not forced to arbitrate matters that they have not agreed to arbitrate). Where, as here, the scope of the arbitration clause agreed to by the parties is intentionally expansive, applying to "any and all disputes arising out of or in connection with [the] agreement," App. 26a, there can be no question but that the parties intended to submit *all* disputes, including disputes over litigation waiver, to the arbitrator for resolution. *See Woodland*, 868 A.2d at 865 (where parties agree to broad arbitration clause, no reason to make exception to *Howsam* for issue of waiver by litigation); *cf. Green Tree*, 539 U.S. at 451-52 (broad arbitration clause encompasses and requires arbitration of any dispute over what kind of arbitration proceeding the parties agreed to).

Finally, the "comparative expertise" rationale offered by the First Circuit in *Marie*, 402 F.3d at 11, and echoed by the Fifth Circuit in *Tristar Financial*, 97 Fed. Appx. at 464, cannot justify an exception to *Howsam* for litigation-related claims of waiver. As a general matter, this Court has rejected the position that arbitrators are less able than judges to decide complex legal and factual questions, deeming any such suggestion "far out of step" with the pro-arbitration policy of the FAA and its endorsement by the Court. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (statutory civil rights claims may be subjected to mandatory arbitration). The same presumption of arbitrator expertise extends to factual questions about the conduct of parties to an arbitration agreement. That much is clear from this Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404 (1967), holding that arbitrators are not only permitted but also required to make certain factual findings in assessing claims of fraud in the

inducement in connection with an arbitration agreement.

Moreover, as a purely practical matter, there is no reason to think that deciding claims of waiver by litigation would somehow push arbitrators beyond their capabilities, or even prove especially difficult for arbitrators. Whether a party has taken discovery not available in arbitration, for instance, or filed a counterclaim without asking for a stay of litigation, or requested arbitration close to a trial date, *see* App. 7a (listing factors relevant to waiver inquiry) – all are facts that an arbitrator can readily ascertain from the record, to the extent that they are even disputed by the parties. If anything, arbitrators may be *better* situated than courts to decide whether a party has obtained through litigation information it could not through arbitration – a key factor in assessing prejudice. *See St. Agnes Med. Ctr. v. PacifiCare*, 82 P.3d 727, 738 (Cal. 2003). Arbitrators are as capable as judges of determining what evidence was in fact obtained through the litigation process but, unlike judges, also have expertise as to what information could be obtained through arbitral discovery and claim-specification processes. In any event, arbitrators routinely assess prejudice when allegations of non-litigation waiver, laches, and similar equitable defenses are brought before them, and can do the same in this context, too. *See, e.g., Ill. Dep't of Human Servs. v. United States Dep't of Educ.*, 263 F. Supp. 2d 1119, 1122 (N.D. Ill. 2003) (affirming arbitrator's resolution of laches claim, including arbitral determination of prejudice); *Alexander Julian, Inc. v. Mimco, Inc.*, No. 00 Civ. 4131, 2001 U.S. Dist. LEXIS 5744, at *8 (S.D.N.Y. 2001) (affirming arbitrator's determination regarding prejudice resulting from delay).

Indeed, this case itself illustrates the ease with which a decision-maker other than the original trial court can resolve a claim of waiver by litigation conduct. The trial court in this case ruled *against* Felder on the question of waiver by litigation conduct, finding that Azoff had not unduly delayed

his request for arbitration nor availed himself of discovery opportunities available only in litigation, and had not prejudiced Felder's ability to take advantage of the "benefits and efficiencies of arbitration." App. 12a. But the appellate court – relying purely on the cold record and the parties' briefs – believed itself fully capable of reaching the opposite conclusion, finding instead that Azoff had indeed impermissibly delayed his request for arbitration and taken "steps not available in arbitration," with the result that Felder was "'affected, misled or prejudiced.'" App. 9a (citation omitted). There is no reason why an arbitrator could not undertake precisely the same analysis as the court below – an outcome that would have the decided advantage of being consistent with, rather than contrary to, the presumption of arbitrability codified by the FAA and reflected in this Court's case law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 20, 2005

APPENDIX

APPENDIX A

Filed 12/9/04 Felder v. Sup. Ct. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DON FELDER, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent. EAGLES, LTD., et al., Real Parties in Interest.	B178402 (Super. Ct. No. BC244814, Cons. w/BC249741 and BC309927) (Mel Red Recana, Judge)

ORIGINAL PROCEEDING. Petition for writ of mandate granted.

Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro LLP, Louis R. Miller and Joel N. Klevens for Petitioner.

No appearance for Respondent.

Kaye Scholer LLP, Larry R. Feldman and Julian Brew for Real Party in Interest Irving Azoff.

O'Melveny & Myers LLP, Daniel M. Petrocelli, Carla J. Christofferson and Thomas P. Jirgal for Real Parties in Interest Don Henley, et al.

Petitioner, Don Felder challenges an order of respondent court granting the motion of defendant Irving Azoff, in which other defendants joined, to compel arbitration of Felder's consolidated lawsuits against them. We hold respondent court erred in granting the motion because the defendants waived their right to do so. Accordingly, we grant the petition.

FACTS AND PROCEDURAL HISTORY

From 1974 to 1980, Felder was a guitarist for the renowned rock band the Eagles. Real party Irving Azoff is the band's long-time manager. The band reunited in 1996 for its "Hell Freezes Over" tour and again in 1999 to perform a series of three concerts leading up to the millennium.

The band also anticipated releasing a four-CD "Box Set" that included three compact discs of previously recorded material and one compact disc of the Millenium Concerts. On August 31, 2000, the band members (Glen Frey, Don Henley, Timothy Schmit, Joe Walsh and Felder) executed a "Preliminary 2000 Deal Memorandum" ("the Memorandum") setting forth the members' rights and obligations concerning the Millenium Album and the Box

Set. Paragraph 6 of the Memorandum provides that "any and all disputes arising out of or in connection with this agreement shall be decided by binding arbitration in Los Angeles, California, as further specified in the 1994 Deal Memorandum."

In February 2001, after Henley and Frey decided to "regroup" without Felder, Felder filed an action in Los Angeles Superior Court against Henley, Frey and Eagles, Ltd. (of which Felder was a one-third owner) (Eagles defendants) for involuntary dissolution of Eagles Ltd. and an accounting. Several months later, in May 2001, Felder filed a second action against the same defendants and several related Eagles entities for breach of an implied-in-fact contract, wrongful termination, breach of fiduciary duty, breach of written contract, an accounting, and declaratory relief. These actions ("the Eagles actions") were consolidated. Felder and the Eagles defendants vigorously litigated the Eagles actions (including a cross-complaint against Felder) for over three years.

In January 2004, Felder filed a complaint against Azoff (Azoff action) for breach of fiduciary duty and fraud. alleging that Azoff conspired with Frey and Henley to exclude Felder from the Eagles' business and ultimately oust Felder from the band. In February 2004, Azoff, represented by the same law firm representing the Eagles defendants, appeared in the action and in April 2004, demurred to Felder's First Amended Complaint on the merits. Azoff did not raise any contention regarding arbitration. Azoff answered the First Amended Complaint. He raised 15 affirmative defenses, but never raised any right to arbitration. As early as February 2004, counsel for Azoff and Felder began negotiations that led to the consolidation of the Azoff action with the Eagles action. Apparently, arbitration was never mentioned. Azoff also sought and obtained a continuance of the trial date because he said he needed more

time for discovery. Azoff and the Eagle defendants agreed that the case should be tried to the respondent court commencing on January 31, 2005 and that date would not be continued. Azoff also participated in discovery. Felder subsequently dismissed his claim for dissolution of Eagles Ltd.

In August 2004, citing the arbitration clause in the Memorandum, Azoff moved to compel arbitration of the actions. Although Azoff was not a signatory to the Memorandum, he asserted he was a third party beneficiary of the agreement and therefore entitled to invoke the arbitration provision because Felder's claims against him constituted a dispute "arising out of or in connection with this agreement." Azoff claimed the alleged conspiracy between himself, Frey and Henley to oust Felder from the Eagles and deprive him of his due included "claims of breach of the 2000 Agreement and breach of fiduciary duty and constructive fraud connected to the agreement, as well as claims that the 2000 Agreement was the direct cause of his termination in February, 2001 and was a critical part of the whole conspiracy that is the basis for his claims against Azoff and the other defendants."

The Eagles defendants joined in Azoff's motion. Although they had not previously invoked their right to arbitration under the Memorandum, the Eagles defendants argued they were entitled to "reassess the applicability of the Preliminary 2000 Deal Memorandum's arbitration agreement to Felder's newly-configured case." By "newly configured case," the Eagles defendants meant Felder had "substantially changed the shape and nature of his lawsuit" against them by adding a new party (Azoff), dismissing his claim for dissolution of Eagles Ltd., and introducing into the consolidated cases "the concept of an overarching conspiracy . . . ."

In opposition to the motion, Felder contended that Azoff

and the Eagles defendants had waived the right to arbitrate. Felder argued that the Eagle defendants had opted to pursue litigation for three years and that Azoff filed a demurrer and motion to strike, litigated for seven months (including negotiations with Felder's counsel that resulted in consolidating all the actions), and requested a trial continuance because he purportedly needed more time to conduct discovery. As noted, Azoff and the Eagles defendants entered into a written stipulation that the case would be tried on January 31, 2005, and the date would not be continued.

On September 20, 2004, respondent court granted the motion to compel arbitration. The court did not specifically address the issue of the applicability of the arbitration clause to Felder's claims against Azoff. Rather, the court appears to have assumed the claims were arbitrable because it found Azoff had not waived his right to arbitrate within the seven-month period in which he had been a defendant in the case. The court found Azoff had timely filed his motion to arbitrate "as soon as his counsel were up to speed in the case," and had "taken no action to undermine or impair [Felder's] ability to take advantage of the benefits and efficiencies of arbitration." The court also noted Felder had taken three years to name Azoff as a defendant in the case. Finally, the court cited the strong public policy in favor of arbitration. Although respondent court found that Azoff had not waived his right to arbitration, it did not address Felder's waiver claim with respect to the Eagle defendants.

We conclude that the Eagle defendants and Azoff waived their right to arbitrate Felder's claims against them. Because of our conclusion, we need not address whether or not Azoff had a right to arbitrate as a third party beneficiary—a contention not raised by the Petition.

DISCUSSION

"Although a written agreement to arbitrate an existing or future dispute is generally enforceable, a petition to compel arbitration will be denied when the right has been waived by the proponent's failure to properly and timely assert it. (Code Civ. Proc., §§ 1281, 1281.2, subd. (a).) This may happen in a variety of contexts, ranging from situations in which the proponent of arbitration has previously taken steps inconsistent with an intent to invoke arbitration, to instances in which the proponent has unreasonably delayed in undertaking the procedure. There is no single determinative test of waiver, and the question for the trial court is one of fact. For us, the question is whether the trial court's decision is supported by substantial evidence. If it is, we must affirm. If not, we may decide the issue as a matter of law." (*Guess?, Inc. v. Superior Court* (2000) 79 Cal. App. 4th 553, 557 (*Guess*).)[1]

It is the court, not the arbitrators, that determines the issue of waiver of arbitration by litigation conduct. (*Omar v. Ralphs Grocery Co.* (2004) 118 Cal.App.4th 955, 964 [waiver as to "nonlitigation conduct" to be decided by the arbitrator].) It is true that in *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 84, the United States Supreme Court said, "So too, the presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability'" [quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.* (1982) 460 U.S. 1, 24-25]. As one court said, "However, *Howsam* involved a determination of whether a period of limitation,

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[1] As the Supreme Court said, "the term 'waiver,' as used in the context of the failure to timely demand arbitration, refers not to a voluntary relinquishment of a known right, but to the loss of a right based on a failure to perform an obligation." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal. 4th 307, 314.)

imposed by the rules of the arbitrator, should be determined by the courts or by the arbitrator. As such, to the extent that the decision addresses waiver issues it is dicta. (*Scott v. First Union Securities, Inc.* (Sup. Ct. N.Y. 2003) 761 N.Y.S.2d 770, 771.) Moreover, the waiver to which *Howsam* referred can and should be construed as not the kind attributable to litigation conduct, which is more properly addressed by the court. Even assuming the Federal Arbitration Act, 9 U.S.C. section 1, et seq., applies notwithstanding the California choice-of-law clause (see *Mount Diablo Medical Center v. Health Net of California* (2002) 101 Cal.App.4th 711), neither *Cone* nor *Howsam* states that waiver issues *must* be decided by arbitrators. Indeed, many California waiver cases have been decided by courts after *Cone*. (See *Guess, supra,* 79 Cal.App.4th 553.)

In *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187 (*St. Agnes*), the Supreme Court set forth the factors a court may consider in determining whether a party has waived its right to arbitration. These factors are: (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "'the litigation machinery has been substantially invoked' and the parties were 'well into the preparation of a lawsuit' before one party notified the other of its intent to arbitrate; (3) whether a party either requested arbitration close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether 'important intervening steps' had occurred (such as a party availing itself of discovery not available in arbitration); and (6) whether the delay 'affected, misled, or prejudiced'" the party opposing arbitration. (*St. Agnes, supra,* 31 Cal.App.4th at p. 1196, citing *Sobremonte* v. *Superior Court* (1998) 61 Cal.App.4th 980, 992.)

In *Guess?, Inc. v. Superior Court, supra,* 79 Cal.App. 4th 553, the Court of Appeal ordered the issuance of a writ of

mandate directing the trial court to vacate its order granting defendant's motion to compel arbitration. The court held defendant had waived its right to enforce an arbitration clause in an agreement because (1) it knew about the arbitration provision before the lawsuit was even filed; (2) it answered the complaint and did not assert the arbitration clause as a defense; and (3) its other conduct in the lawsuit was "wholly inconsistent with its present desire to arbitrate." For months, defendant participated fully in the discovery process, objecting to plaintiff's discovery requests on a number of grounds but "never once suggesting that discovery should be barred because this dispute had to be arbitrated." Defendant "sent two sets of lawyers to the third-party depositions and took full advantage of every opportunity to cross-examine the deponents," but never suggested the depositions were inappropriate because the dispute should have been arbitrated. Thus, defendant was able to take "full advantage of the opportunity to test the validity of Guess's claims, both legally and factually, primarily at Guess's expense." The result was that the plaintiff, Guess, had suffered prejudice by being "exposed to the substantial expense of pretrial discovery and motions that would have been avoided had Kirkland timely and successfully asserted a right to arbitrate." (*Id.* at pp. 557-559.)

This case presents even a stronger case for waiver than that presented in *Guess?, Inc., supra,* 79 Cal.App.4th 553. Azoff, initially represented by the same counsel representing the Eagles defendants, challenged the pleadings, answered, asserted affirmative defenses without raising the arbitration clause, participated in months of discovery, negotiated and stipulated to the consolidation of actions that had been litigated for over three years, sought and obtained a continuance of the trial date for discovery purposes and to prepare for trial, and stipulated to the trial of the consolidated actions on January 31, 2005. During these proceedings,

Azoff gained access to the discovery that had taken place during the Eagles action. As to Azoff, almost all of the factors enumerated by the Supreme Court in *St. Agnes, supra,* 31 Cal.4th at 1196 militate in favor of waiver. Azoff's actions were inconsistent with the right to arbitrate; there had been substantial litigation activity before Azoff sought arbitration; the request for arbitration was close to a trial date; and Azoff took steps not available in arbitration. Felder was "affected, misled or prejudiced" (*St. Agnes, supra,* 31 Cal.4th at 992) by the delay and actions of Azoff. There is not sufficient evidence supporting the trial court's finding that Azoff did not waive arbitration.

The facts concerning the Eagles presents an even stronger case for waiver. Prior to their belated effort to invoke their right to arbitrate any claims of Felder under the Memorandum, the Eagles defendants filed a cross-complaint against Felder and vigorously litigated the now-consolidated cases for over three years. This intense litigation generated numerous court filings and thousands of pages of discovery. The Eagles defendants even brought a discovery motion in July 2004. Without a doubt, "the litigation machinery has been substantially invoked." (*Sobremonte v. Superior Court, supra,* 61 Cal.App.4th at p. 992.) Moreover, a mere four days prior to joining in Azoff's motion, the Eagles defendants stipulated that the case would be tried on January 31, 2005, that this was a firm date, and that no party would request a trial continuance. Felder's prejudice is demonstrated by the expenditure of hundreds of thousands of dollars in attorney's fees and participation in a costly discovery process that allowed the defendants to gain information about Felder's case that they could not have gained through arbitration. (See *Guess?, Inc. v. Superior Court, supra,* 79 Cal.App.4th at p. 558; *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 212-215; *Sobremonte v. Superior Court, supra,* 61 Cal.App.4th at p. 995.) There is virtually no evidence that the Eagles

defendants did not waive arbitration.

The Eagles defendants' assert that they are entitled "revisit" their prior decision not to invoke their right to arbitration under the Memorandum because the circumstances of the litigation changed with the dismissal of the dissolution claim and the introduction of new claims against Azoff. The Eagles defendants rely primarily on *Keating v. Superior Court* (1982) 31 Cal.3d 584 (overruled on other grounds in *Southland Corp. v. Keating* (1984) 465 U.S. 1, 5). *Keating* does not compel a finding of no waiver here. That case involved both individual and class actions by franchisees of 7-11 stores against the parent company, Southland Corp. The franchisees claimed Southland had waived its right to compel arbitration because it did not initially raise arbitration as a defense and removed the cases to federal court, an act the franchisees claimed was inconsistent with the right to arbitrate. The Supreme Court affirmed the trial court's finding of no waiver, noting Southland had moved promptly to remove the case and, upon remand, had asserted arbitration as an affirmative defense in its amended pleading. Most significant to this case, the court noted that prior to remand, "the only discovery which took place consisted of an exchange of documents to franchisees' benefit. . . . We discern no impropriety on the part of Southland, or prejudice to franchisees, in these brief transactions." (*Keating v. Superior Court, supra,* 31 Cal.3d at p. 606.)

The action against Azoff did not materially change the action against the Eagles. Indeed, the parties agreed to consolidate the actions and to a trial date.

In view of the uncontradicted facts, the trial court's decision to compel arbitration, and therefore to find impliedly or expressly that there was no waiver of arbitration, is not supported by substantial evidence.

DISPOSITION

A peremptory writ shall issue directing respondent court to vacate it order of September 20, 2004, granting defendants' motions to compel arbitration, and enter a new and different order denying the motions. Costs are awarded to Felder.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

GRIGNON, Acting P.J.

ARMSTRONG, J.

APPENDIX B

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
DEPARTMENT 45

DON FELDER, Plaintiff vs.
IRVING AZOFF, et al., Defendants
BC 244814 [Consolidated with BC 249741 and BC 309927]

ORDER

The Court took under submission defendant Azoff's Motion To Compel Arbitration All Claims In the Consolidated Cases And To Stay Proceedings Pending the Outcome Of Arbitration. Having considered the parties' pleadings, the points and authorities cited, and oral arguments, the Court grants the defendant's Motion.

The principal question is whether defendant Azoff waived his right to arbitrate within the seven-month period in which he had been a defendant in the consolidated cases.

Prejudice is critical in a waiver determination. The record indicates that Azoff has taken no action to undermine or impair plaintiff's ability to take advantage of the benefits and efficiencies of arbitration. In fact, Plaintiff waited 3 years to include Azoff as a defendant. Azoff has done no discovery; instead it is plaintiff who had made discovery requests of Azoff. Thus, Azoff did not use the discovery process to gain information about plaintiff's case which he would not have gained in arbitration. Azoff timely filed a Motion to Arbitrate as soon as his counsel were up to speed in the case.

Finally, "... courts assess prejudice with the recognition that California's arbitration statutes reflect 'a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution' and are intended 'to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing.'" (St. Agnes Medical Center v. Pacific Care of California, 31 Cal. 4th 1187, 1204).

WHEREFORE, the Court orders these consolidated cases to binding arbitration and stays all proceedings pending the outcome of arbitration.

SO ORDERED.

Dated: September 20, 2004

s/
MEL RED RECANA
Judge

APPENDIX C

Court of Appeal, Second Appellate District, Division Five
- No. B178402
S130769

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DON FELDER, Petitioner,

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent;

EAGLES LTD et al., Real Parties in Interest.

Petitions for review DENIED.

SUPREME COURT
FILED
MAR 23 2005
Frederick K. Ohlrich Clerk
DEPUTY

GEORGE
Chief Justice

APPENDIX D

PRELIMINARY 2000 DEAL MEMORANDUM

The following shall constitute an agreement (the "Preliminary 2000 Deal Memorandum"), dated as of August 31, 2000, among DON FELDER, GLENN FREY, DON HENLEY, TIMOTHY B. SCHMIT and JOE WALSH (individually, a "Member" and collectively, the "Members"), regarding certain activities of The Eagles (the "Group") hereinafter described. All capitalized terms not defined herein shall have the same meaning as under the Deal Memorandum dated as of March 15, 1994 among the Members, as amended (the "1994 Deal Memorandum").

WHEREAS, the Members desire to confirm their rights and obligations in connection with certain exploitations of recordings heretofore recorded by the Group, as presently or heretofore constituted, to be initiated in the year 2000;

NOW, THEREFORE, the parties agree as follows:

1. Box Set.

(a) To the extent that the written consent of the Members, or some of them, is required, each of the undersigned Members, acting individually and on behalf of any entity whose consent may be required and for which such Member has the authority to grant such consent [including, without limitation, Eagles, Ltd. ("LTD"), Eagles Touring Co. ("ETC"), Eagles Recording Co. ("ERC") and such Member's controlled music publishing company designee(s) ("Controlled Publisher(s)) hereby consents to, and grants the necessary rights to enable, the entry by N.E.A. LLC ("NEA"), a limited liability company co-owned by Glenn Frey and Don Henley, into an agreement (the "Elektra Box Set Agreement") with Elektra Entertainment Group Inc.

("Elektra") for the worldwide, perpetual rights to distribute and sell, on such terms and conditions as NEA shall negotiate with Elektra (subject to paragraph 3 below), a box set (the "Box Set") of Eagles Recordings consisting of four (4) CDs, three (3) of which (the "Catalogue CDs") will contain previously released masters (the particular such masters being substantially the same as those listed on the track listing attached as Schedule 1 hereto) and the final one (1) of which (the "Live CD") shall consist of live recordings selected by Glenn Frey and Don Henley from the live recordings recorded at the Eagles' December, 1999 concerts at Mandalay Bay and/or Staples Center, which live recordings were "sweetened" in additional recording sessions at which each of the Members performed in July, 2000.

(b) (i) Provided that the Elektra Box Set Agreement is consummated and until such time, if ever, as the "Final 2000 Deal Memorandum" (as defined in paragraph 4 below) is executed by the "Requisite Members", the compensation payable to the Members in respect of the Box Set shall be computed and determined in accordance with the principles reflected in Exhibit A attached hereto (entitled Eagles/Elektra; Box Set Income Projection; Summary of Net Amounts By Entity," and the attached explanatory notes. The Members acknowledge and agree that the amounts of revenue and expense set forth on Exhibit A are projections only and that no representation or warranty is being made with respect to whether the Elektra Box Set Agreement will be executed, whether the Box Set will or will not be released, or the quantities of sales of the Box Set, if released, which will be made or of the gross revenues which may be generated or of the expenses which may be incurred in connection with the Box Set or otherwise and that Exhibit A is only intended to show the Members' projected relative earnings, compared to each other, based on hypothetical sales and expense figures.

(ii) As used herein, the "Key Deal Terms" shall mean (A) the Members' relative earnings, compared to each other, which shall be as shown on Exhibits A and B hereto; (B) the advances payable to each Member upon the release, if any, of the Box Set and Millennium Album, which shall be not less than the amounts stated in paragraphs 1(c) and 2(c), respectively; and (C) the "Minimum Deal Terms" stated in paragraph 3 below, as applicable. As used in paragraph 1(b)(i) above and paragraph 2(b) below, the term "requisite Members" shall mean: (A) if the Final 2000 Deal Memorandum incorporates all of the Key Deal Terms, a majority of the Members; or (B) if the Final 2000 Deal Memorandum incorporates any change to any of the Key Deal Terms which is adverse to any Member, all of the Members.

(c) The Members acknowledge that the aggregate advance offered by Elektra to NEA in respect of the Box Set is Three Million Five Hundred Eighty-Five Thousand Dollars ($3,585,000). Notwithstanding Exhibit A, but subject to paragraph 3 below, the Members agree that a fully-recoupable advance shall be paid to each of Don Felder, Timothy B. Schmit and Joe Walsh in an amount equal to one-seventh (1/7) of eighty-five percent (85%) of the aggregate such advance actually paid by Elektra to NEA, a fully recoupable advance shall be paid to each of Don Henley and Glenn Frey in an amount equal to two-sevenths (2/7ths) of eighty-five percent (85%) thereof, and the remaining fifteen percent (15%) thereof shall be paid to Irving Azoff as management commissions, payable in each case if, as and when such advance is paid by Elektra.

2. <u>The Millennium Album</u>:

(a) To the extent that the written consent of the Members, or some of them, is required, each of the undersigned Members, acting individually and on behalf of

any entity whose consent may be required and for which such Member has the authority to grant such consent (including, without limitation, LTD, ETC, ERC and such Member's controlled music publishing company designee) hereby consents to, and grants the necessary rights to enable, the entry by NEA into an agreement with Giant Records ("Giant") for the United States and Canada (the "Giant Agreement") and an agreement with Warner Music International ("WMI") for the rest of the world (the "WMI Agreement") for the rights to distribute and sell, on such terms and conditions as NEA shall negotiate with Giant and WMI (subject to paragraph 3 below), a single disc (or equivalent) album (the "Millennium Album") of recordings under the artist name "The Eagles" which shall consist primarily of live recordings selected by Glenn Frey and Don Henley from the live recordings recorded at the Eagles' December 1999 concerts at Mandalay Bay and/or Staples Center and "sweetened," as aforesaid, and which may include, at their election, up to four (4) new studio recordings.

(b) Provided that the Giant Agreement and the WMI Agreements are consummated and until such time, if ever, as the "Final 2000 Deal Memorandum" (as defined in paragraph 4 below) is executed by the "requisite Members," the compensation payable to the Members in respect of the Millennium Album shall be computed and determined in accordance with the principles reflected in Exhibit B attached hereto (entitled Eagles/Giant Records; Millennium Live CD Income Projections; Summary of Net Amounts By Entity; and the attached explanatory notes. The Members acknowledge and agree that the amounts of revenue and expense set forth on Exhibit B are projections only and that no representation or warranty is being made with respect to whether the Giant Agreement or the WMI Agreement will be executed, whether the Millennium Album will or will not be released, or the quantities of sales of the Millennium Album,

if released, which will be made or of the gross revenues which may be generated or of the expenses which may be incurred in connection with the Millennium Album and that Exhibit B is only intended to show the Members' projected relative earnings, compared to each other, based on hypothetical sales and expense figures, which figures assume (without any representation or warranty) that all of the Members will have performed on all of the recordings contained therein.

(c) The Members acknowledge that the aggregate advance offered by WMI to NEA or its designee in respect of the Millennium Album is One Million Dollars ($1,000,000) if it contains no new studio recordings or One Million Five Hundred Thousand Dollars ($1,500,000) if it contains two (2) new studio recordings. Provided that NEA authorizes WMI to release the Millennium Album, and subject to paragraph 3 below, the Members agree that a fully recoupable advance shall be paid to each of Don Felder, Timothy B. Schmit and Joe Walsh in an amount equal to one-seventh (1/7) of eighty-five percent (85%) of the aggregate such advance actually paid by WMI to NEA, a fully recoupable advance shall be paid to each of Don Henley and Glenn Frey in an amount equal to two-sevenths (2/7ths) of eighty-five percent (85%) thereof, and the remaining fifteen percent (15%) thereof shall be paid to Irving Azoff as management commissions, payable in each case if, as and when such advance is paid by WMI.

3. Minimum Deal Terms of Agreements With Third Parties. Notwithstanding anything to the contrary in paragraphs 1 or 2 above, but without establishing any precedent as to how many or which Members' approval needs to be obtained in order for any particular exploitation of new or existing recordings to be released under the artist name "The Eagles," this Preliminary 2000 Deal Memorandum does not authorize NEA, Don Henley and/or

Glenn Frey or any other entity owned or controlled by either of them (for this purpose, the "Contracting Eagles Entity") to agree with the applicable third party to any term less favorable to the Contracting Eagles Entity than any of the following terms (the "Minimum Deal Terms"), as applicable, without the prior written consent of all of the Members:

(a) in or in connection with the Elektra Box Set Agreement:

(i) an advance in respect of the delivery to and release by Elektra of the Box Set, of Three Million Five Hundred Eighty-Five Thousand Dollars ($3,585,000);

(ii) a basic royalty rate in respect of top line, full price, sales of the Catalog CDs contained in the Box Set of (A) 22% of the retail base price for the U.S.A. and Canada and (B) 20% of the retail base price outside the U.S.A. and Canada (which rate may be converted to a percentage of the dealer price on such terms as NEA and Elektra shall negotiate);

(iii) basic payment terms for U.S.A. sales of the Live CD as contained in the Box Set on a "P&D" basis with a distribution fee of 22%, and a basic royalty rate in respect of top line, full price sales outside the U.S.A. of the Live CD as contained in the Box Set of 23% of the retail base price (which rate may be converted to a percentage of the dealer price on such terms as NEA and Elektra shall negotiate);

(iv) a suggested retail list price ("SRLP") for the initial release of the Box Set in the U.S.A. of $59.98; and

(v) mechanical royalties payable for U.S.A. sales of the Catalog CDs to the Box Set at a basic rate of the minimum statutory rate as of the date of initial release thereof ("M.S.R.")with a cap of 36 x M.S.R.

(b) in or in connection with the Giant Agreement basic payment terms in respect of U.S.A. sales of the

Millennium Album on a "P&D" basis with a distribution fee of 22%; or

(c) in or in connection with the WMI Agreement:

(i) an advance in respect of the delivery to and release by WMI of the Millennium Album of One Million Dollars ($1,000,000) if it contains no new studio recordings or One Million Five Hundred Thousand Dollars ($1,500,000) if it contains two (2) new studio recordings; or

(ii) a basic royalty rate in respect of top-line, full price sales of the Millennium Album in CD configuration of 23% of the retail base price (which rate may be converted to a percentage of dealer price on such terms as NEA and WMI shall negotiate).

4. Miscellaneous.

(a) Each Member shall have direct, equal and independent rights to examine the books and records of NEA, the Eagles Entities and any other entity (if any) owned or controlled by any of the Members which is utilized to implement the terms hereof. The Giant Agreement will provide to NEA customary and reasonable audit rights with respect to the books and records of Giant pertaining to the Millennium Album and the Live CD, and, for the purposes of the immediately preceding sentence, the books and records of NEA shall be deemed to include such information as NEA may obtain from Giant's books and records concerning the Millennium Album and the Live CD, as applicable. If NEA fails or declines to audit any particular statement from Giant or WMI, any Member shall have the right to trigger such audit at that Member's expense, subject to reimbursement from any recovery from such audit. Upon request, NEA shall furnish to each Member a copy of each royalty or distribution statement received by NEA from Giant, Elektra, WMI or any other distributor or licensee of the Box Set or Millennium Album.

(b) This Preliminary 2000 Deal Memorandum does not authorize the entry into any agreements for the performance of concerts by The Eagles or for the exploitation of so-called merchandising rights with respect to the Eagles.

(c) Nothing in this Preliminary 2000 Deal Memorandum is intended to change the rights, if any, of any Member or Members or of any Eagles Entity with respect to ownership and control of the name "The Eagles."

(d) Any excess mechanical royalty payments (*i.e.*, required to be paid to publishers, but either not paid by Elektra or paid by Elektra and deducted from payments otherwise owed to NEA, any Eagles Entity or any Controlled Publisher(s)) will be paid and deducted from the "Override" described in Exhibit A.

(e) Mechanical royalties on copies of the Live CD and Millennium Album distributed on a "P&D" basis will be paid at the full statutory rate or the minimum statutory rate, as NEA shall decide, and on such other terms as NEA shall determine in its good faith judgment.

5. Consent to Representation of Adverse Interests; Waiver of Claims.

(a) Frey and Henley have engaged Manatt, Phelps & Phillips LLP ("MPP") to prepare and negotiate this Preliminary Deal Memorandum and the Final 2000 Deal Memorandum (as defined in paragraph 4 below) on their behalf and to prepare and negotiate, on behalf of Eagles Ltd., the New Companies, and NEA, as applicable, any other agreements necessary or desirable to be prepared and negotiated in connection with the subject matter hereof.

(b) Each of the other Members acknowledges and agrees that he has been advised to obtain his own independent legal counsel to advise him in connection with this Preliminary Deal Memorandum and the Final Deal

Memorandum, and such Member has either voluntarily chosen to obtain same or voluntarily chosen not to do so. Each Member's attorney in connection with this Preliminary Deal Memorandum and the Final Deal Memorandum is listed in paragraph 7 below.

(c) No attorney is representing the Group in connection with the negotiation of this Preliminary Deal Memorandum or the Final Deal Memorandum.

(d) Each of the Members acknowledges that MPP currently represents, or has heretofore represented, the following parties or related individuals or entities: (i) each of Henley and Frey in certain of their individual activities; (ii) NEA; (iii) various Eagles-related entities (individually an "Eagles Entity" and collectively "Eagles Entities"), including LTD, ETC, ERC and Eagles Merchandising Co.; (iv) Joe Walsh; and (v) Irving Azoff and his affiliated entities (including Giant Records).

(e) Each Member hereby irrevocably consents to MPP's concurrent representation of its above-named clients (including Joe Walsh) in connection with all matters described herein and agrees that such Member shall not make any claim that MPP or any attorney or legal assistant affiliated with MPP breached any duty of loyalty or other fiduciary duty to such Member or any of the Eagles Entities or to any other person or entity in connection with the matters which are the subject matter hereof.

(f) Each Member likewise waives any and all claims in the nature of conflict of interest, breach of duty of loyalty or breach of other fiduciary duty against (i) each other Member and each Eagles Entity; (ii) Irving Azoff and all companies owned or controlled by him (collectively "Azoff"); and (iii) Gelfand, Rennert & Feldman (collectively "GRF") and all employees, shareholders, partners, directors or other representatives thereof, arising out of or in

connection with their roles in connection with this agreement and the subject matter hereof.

(g) Without limitation of the foregoing, each Member likewise expressly waives any and all claims against each other, each Eagles Entity, Azoff, MPP, GRF and their designees that this agreement is void, voidable or unenforceable, or that its execution or performance gives rise to a claim for damages, by reason of duress, undue influence, breach of duty, improper threat, improper methods or otherwise. Each Member expressly acknowledges that he enters into this agreement freely, voluntarily, based on full and adequate information and after having had an opportunity to consult with counsel as aforesaid.

(h) Nothing contained herein shall be deemed to determine or affect in any manner whatsoever the rights of the Members or any Eagles Entity to terminate a Member as a member of the Group or as an owner or income participant in any Eagles Entity or the rights or remedies of any Member in the event of any such termination or purported termination occurring after the date hereof. In the event of any such termination or purported termination occurring after the date hereof, the validity or invalidity of such termination or purported termination and the rights and remedies of such Member and of the applicable Eagles Entities in connection with such termination or purported termination shall not be affected by any provision of this agreement, except that such rights and remedies shall not include rescission, cancellation or termination of this agreement, nor shall they modify the rights, obligations or compensation of the Members with respect to the Box Set and the Millennium Album.

6. Binding Agreement. This constitutes a binding agreement among the parties hereto, and the Members expressly acknowledge that in entering into the agreements with third parties contemplated hereby, including Elektra, Giant and WMI, and by incurring expenses in connection

with the subject matter hereof, NEA, Don Henley and Glenn Frey will be acting in material and detrimental reliance hereon. The parties intend to enter into a more detailed agreement with respect to the subject matter hereof, the terms of which, to the extent not fully set forth herein, shall be negotiated in good faith among the Members. Until such time, if ever, as such more detailed agreement (the "Final 2000 Deal Memorandum") shall be executed by the parties hereto, this agreement shall be deemed to form a binding agreement with respect to the subject matter hereof. In order to induce the other Members to enter into this agreement, each Member represents and warrants to the other Members (a) that (other than the agreements referred to herein and other pre-existing written agreements indirectly pertaining to the Box Set and/or Millennium Album, such as the various Eagles recording agreements with Elektra and Geffen and the agreements for the performance of the concerts at which the subject "live" recordings were recorded) this agreement is the sole agreement between and/or among the parties pertaining to the Box Set and/or the Millennium Album, and (b) that he has neither offered to any other Member(s) or any representative(s) thereof, including Azoff, nor been offered by any other Member(s) or any representative(s) thereof, including Azoff, any financial consideration or other material consideration of any nature whatsoever, other than what is stated herein and what is stated or implied in Exhibits A and B attached hereto, in order to induce such Member to enter into this agreement. No Member shall refuse to render his services to the extent such services are reasonably necessary to implement this agreement and no Member shall make any claim that NEA, Don Henley, Glenn Frey or any other entity designated by them lacked the consent of such Member to take any action reasonably necessary or desirable to implement the terms hereof. Each of the Members shall execute such other documents as he may be reasonably requested to execute to implement the terms hereof. This

agreement shall be governed by the laws of the State of California without regard to its choice-of-law principles, and in Los Angeles, California shall have exclusive jurisdiction and venue over any and all disputes arising out of or in connection with this agreement shall be decided by binding arbitration in Los Angeles, California, as further specified in the 1994 Deal Memorandum.

7. Notices. All notices which any party desires to send to any other party or parties hereunder shall be sent by fax (to the Member designated below), by certified mail, return receipt requested, by personal delivery or by Federal Express or other overnight delivery service regularly providing proof of delivery, as follows:

Don Henley
c/o Manatt, Phelps & Phillips, LLP
11355 West Olympic Boulevard
Los Angeles, CA 90064
Attn: L. Lee Phillips, Esq.
Lawrence J. Blake, Esq.
Fax # (310) 312-1224

Don Felder
c/o Barry Tyerman, Esq.
Armstrong, Hirsch, Jackoway, Tyerman & Wertheimer
1888 Century Park East, 18th Floor
Los Angeles, CA 90067-1722
Fax # (310) 551-4448

Glenn Frey
c/o Manatt, Phelps & Phillips, LLP
11355 West Olympic Boulevard
Los Angeles, CA 90064
Attn: L. Lee Phillips, Esq.
Lawrence J. Blake, Esq.
Fax # (310) 312-4224

Timothy B. Schmit
c/o Jeffrey Taylor Light, Esq.
Myman, Abell, Fineman, Greenspan & Light
11777 San Vicente Boulevard
Los Angeles, CA 90049-5061
Fax # (310) 207-2680

Joe Walsh

with a copy of notices to Joe

c/o Wallace D. Franson
Jess S. Morgan & Co.
5750 Wilshire Boulevard,
Suite 590
Los Angeles, CA 90036
Fax # (323) 937-6532

Walsh to:

Scott D. Harrington, Esq.
Manatt, Phelps & Phillips
LLP
11355 W. Olympic Boulevard
Los Angeles, CA 90064
Fax # (310) 312-4224

8. Counterparts. This agreement may be executed in counterparts, and facsimile signatures shall be deemed as valid as original signatures.

IN WITNESS WHEREOF, the parties have indicated their agreement to the terms and conditions hereof by signing below. EACH MEMBER ACKNOWLEDGES THAT THE ATTORNEY REPRESENTING SUCH MEMBER HAS EXPLAINED THE TERMS AND CONDITIONS HEREOF, INCLUDING THOSE REGARDING SUCH MEMBER'S CONSENT TO THE REPRESENTATION OF ADVERSE INTERESTS AND WAIVER OF CLAIMS, TO SUCH MEMBER.

/s/
DON HENLEY, individually and on behalf of NEA, LLC and any and all applicable Eagles Entities and his Controlled Publisher(s)

GLENN FREY, individually and on behalf of NEA, LLC and any and all applicable Eagles Entities and his Controlled Publisher(s)

/s/
DON FELDER individually and on behalf of Eagles Ltd. and his Controlled Publisher(s)

TIMOTHY B. SCHMIT, individually and on behalf of his Controlled Publisher(s)

JOE WALSH, individually and on behalf of his Controlled Publisher(s)

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TIMOTHY B. SCHMIT, individually and on behalf of his Controlled Publisher(s)

/s/_____
JOE WALSH, individually and on behalf of his Controlled Publisher(s)

(2)

No. 04-1713

Supreme Court, U.S.
FILED
AUG 15 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

EAGLES, LTD., DON HENLEY, GLENN FREY, EAGLES TOURING CO., EAGLES MERCHANDISING CO., EAGLES RECORDING CO., N.E.A., LLC AND IRVING AZOFF,

Petitioners,

v.

DON FELDER,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

BRIEF IN OPPOSITION

LOUIS R. MILLER
Counsel of Record
JOEL N. KLEVENS
CHRISTENSEN, MILLER, FINK, JACOBS, GLASER, WEIL & SHAPIRO, LLP
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SUMMARY AND COUNTER-STATEMENT OF THE CASE

In an unpublished unanimous opinion, which the California Supreme Court declined to review, the California Court of Appeal applied established California law to find that the Eagles Defendants and Irving Azoff (collectively herein "petitioners"), by their litigation conduct, waived any right they might have had to arbitrate respondent's claims against them. The decision does not conflict with applicable federal precedent. In short, no basis exists for this Court's interest in the case or its outcome.

Petitioners' statement of the case ignores the critical facts on which the California Court of Appeal based its decision. (*See* Appendix at 2a-5a and 8a-10a.) As the Court of Appeal found, the undisputed evidence established that petitioners aggressively litigated the complaints brought against them by plaintiff and respondent Don Felder ("Felder") in Los Angeles Superior Court for more than three years. Then, on the eve of trial, after years of written discovery comprising thousands of pages, extensive law and motion practice, twelve depositions, multiple status conferences, trial continuances, consolidation of the pending actions, and a stipulation to a firm trial date, petitioners moved to compel arbitration. As the Court of Appeal stated, "[t]here is virtually no evidence that the Eagles Defendants did not waive arbitration." (Appendix 9a-10a.)

No significant issue for this Court is presented by petitioners. Even if petitioners were correct – and they are not – that the question of waiver by litigation conduct should have been submitted to an arbitrator and not decided by the courts, such a submission in this case

would result only in delay. No decision maker, whether court or arbitrator, could fail to find waiver under the undisputed facts in this case.

Moreover, the decision by the California Court of Appeal does not conflict with this Court's decision in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), nor is there a conflict among the Circuit Courts that requires resolution. The clear weight of applicable authority is that waiver of arbitration by litigation conduct, as in the instant case, is an issue properly decided by the courts.

Respondent Don Felder ("Felder") was the lead guitarist of the Eagles band for 25 years, until he was wrongfully ousted from the band in February 2001. Felder was and is a one-third owner of Eagles Ltd., the company that owns the Eagles name and trademark. Felder composed the music for the Eagles' most famous song, "Hotel California," as well as other songs.

Felder brought two actions (the "Eagles Actions") in 2001 against Don Henley and Glenn Frey ("the Eagles Defendants"), who are petitioners herein, and who are the other one-third owners of Eagles, Ltd. and are the principal singers and composers in the band. The two Eagles Actions against Henley and Frey and various entities they created to receive the revenues of the Eagles' touring, recording and merchandising activities alleged that Felder had been wrongfully ousted from the band in breach of an agreement that Felder would only be removed from the band for cause and in order to deprive Felder of his rights to share in the revenues of the band as a one-third owner.

After the two Eagles Actions were consolidated, they were aggressively litigated by Felder and the Eagles Defendants (Henley, Frey and the related Eagles entities)

for three and one-half years. Although the Eagles Defendants were fully aware that one of the agreements among the band members – the Preliminary 2000 Deal Memorandum (attached in the Appendix at 15a) – contained a reference to arbitration,[1] they elected through their counsel to pursue their defense in the Los Angeles County Superior Court, and not in arbitration. Thus, the Eagles Defendants answered the complaints against them asserting 15 affirmative defenses, none of which made any reference to a claimed right to arbitrate the dispute. The Eagles Defendants have never contended that they were unaware of the purported arbitration clause. Rather, they made a decision to pursue the litigation through the courts.

The Eagles Defendants took and defended 12 depositions, comprising more than 4,300 pages, including five full days of Felder's deposition taken by the Eagles Defendants. In addition, the Eagles Defendants propounded two massive sets of document requests, one set of requests for admissions, three sets of form interrogatories, and one set of special interrogatories exploring in detail all of the legal theories, facts, documents, and witnesses upon which Felder relied. As late as July 1, 2004, the Eagles Defendants moved to compel further responses to their second

[1] The arbitration clause on which petitioners rely herein is unintelligible when read in its entirety: "This agreement shall be governed by the laws of the State of California without regard to its choice-of-law principles, and in Los Angeles, California shall have exclusive jurisdiction and venue over any and all disputes arising out of or in connection with this agreement shall be decided by binding arbitration in Los Angeles, California, as further specified in the 1994 Deal Memorandum." Appendix 25a-26a. Petitioners' quotation of a portion of that paragraph only is designed to bolster their claim that the arbitration clause is clear and expansive. It is anything but.

set of requests for admissions, third set of form interrogatories, and first set of special interrogatories.

The Eagles Defendants also filed their own cross-complaint against Felder in August 2002, alleging that Felder intended to write a book about the Eagles and that that would violate a confidentiality provision in the 1994 Deal Memorandum among the band members. That cross-complaint is still pending in the action.

On June 14, 2004, Felder voluntarily dismissed without prejudice the prayer in his second amended complaint for dissolution of Eagles, Ltd., leaving to be tried in the Eagles Actions his causes of action for breach of an implied-in-fact employment contract, wrongful termination, breach of fiduciary duty, breach of written contract, accounting, and declaratory relief.

On January 30, 2004, Felder filed a separate action against petitioner Irving Azoff, the manager of the Eagles, for breach of fiduciary duties and constructive fraud (the "Azoff Action"). Felder alleged that Azoff owed fiduciary duties to him as the manager of the Eagles and as his manager and that Azoff breached those duties by conspiring with Henley and Frey to orchestrate Felder's ouster from the band and by favoring the interests of Henley, Frey and Azoff over the interests of Felder.

In February of 2004, O'Melveny & Myers – the same attorneys who had represented the Eagles Defendants since February 2001 – appeared on behalf of Azoff. With full knowledge that the Eagles Actions had been litigated for three years and were pending for trial, Azoff stipulated that the Azoff Action should be consolidated for all further proceedings with the Eagles Actions, and the Superior Court so ordered on March 10, 2004. Neither the Eagles

Defendants nor Azoff made any mention of any claimed right to arbitration.

Azoff then followed the same litigation course as had the Eagles Defendants before him. He moved to strike allegations from the Azoff Action and demurred to the complaint, arguing that Azoff was not Felder's manager and owed no fiduciary duties to him. After his demurrer was overruled, Azoff answered the complaint against him, asserting 15 affirmative defenses which never even mentioned a claimed right to arbitration.

At a hearing on May 3, 2004 in the Superior Court, Azoff sought a continuance of the trial in the consolidated action from August 16, 2004 to spring 2005. The basis for Azoff's request was that Azoff needed more time to conduct discovery since he had only been named as a defendant on January 30, 2004. There was no suggestion that the consolidated action should be arbitrated. To the contrary, Azoff and the Eagles Defendants agreed expressly that the case should be tried in the Superior Court and agreed that the trial date would be January 31, 2005.

Although Azoff did not propound his own written discovery in the Azoff Action in addition to the massive written discovery propounded by the Eagles Defendants in the Eagles Actions, Azoff did schedule depositions of Felder and others and responded to Felder's written discovery. In those responses, Azoff asserted numerous objections which never raised a claim to arbitration.

In July 2004, new counsel for Azoff substituted into the case in place of O'Melveny & Myers, which continued to represent the Eagles Defendants. Azoff's new counsel, Kaye Scholer, asked for a continuance of Azoff's deposition, then scheduled for July 13, 2004, to provide more

time to prepare for the deposition. All parties in the consolidated action then entered into a written stipulation, which continued Azoff's deposition to August 11, 2004, confirmed the dates for the deposition of Felder and others in late September 2004, and confirmed in writing the agreement of all parties in the consolidated action that the January 31, 2005 trial date was "firm" and would not be continued. The Superior Court entered its order on the stipulation on August 5, 2004.

Azoff's new counsel conceded at a hearing on August 9, 2004 that his file consisted of 27 boxes and included the discovery taken in the Eagles Actions. Nevertheless, on that same date, Azoff, through his new counsel, for the first time, filed a motion to compel arbitration of all claims in the consolidated action. The right to arbitration was claimed under the purported arbitration clause in the Preliminary 2000 Deal Memorandum. (*See* footnote 1, *supra.*) Although the purported arbitration agreement stated that the right to arbitrate was "further specified in the 1994 Deal Memorandum," the 1994 Deal Memorandum made no reference whatsoever to arbitration. Also, on August 9, 2004, the Eagles Defendants joined in Azoff's motion to compel arbitration of all claims in the consolidated action.

The motion to compel arbitration by Azoff and the Eagles Defendants was heard in the Superior Court on September 15, 2004. On September 20, 2004, the court issued its ruling, ordering the consolidated cases to binding arbitration and staying all proceedings pending the outcome of arbitration. The court found that Azoff had not waived his right to arbitrate because his motion was timely, he had not conducted any discovery of his own, and plaintiff had suffered no prejudice from Azoff's actions.

The court's ruling said nothing about the litigation of the Eagles Actions, any prejudice to Felder from the three and one-half years of litigation of the Eagles Actions by the same counsel who had represented Azoff, the stipulation to consolidate the Eagles Actions and the Azoff Action, or the stipulation and court order to try the consolidated action in respondent court on January 30, 2005. (Appendix at 12a-13a).

The above-stated facts are not in dispute and are set forth in a verified petition for writ of mandate, which was filed by Felder in the California Court of Appeal on October 12, 2004. For the convenience of the Court, that verified petition for writ of mandate is attached hereto as Respondent's Appendix at pages 1a-15a.

After full briefing and oral argument, the California Court of Appeal issued a peremptory writ of mandate compelling the Superior Court to vacate its order compelling arbitration of the consolidated action. The Court of Appeal found that the Eagles Defendants and Azoff, with full knowledge of the purported arbitration clause, had waived any right they might have had to arbitrate the disputes against them by their litigation conduct, which was entirely inconsistent with any claimed right to arbitration. The decision was unanimous and unpublished. Thereafter, the California Supreme Court denied petitioners' petition for review of the decision of the Court of Appeal. (Appendix at 14a.)

After the remittitur issued on March 23, 2005, the Superior Court set a status conference to reset the case for trial. After initially setting the trial of the consolidated action on November 7, 2005, the Superior Court heard a motion from the Eagles Defendants to continue the trial to

September 2006 because of the claim that trial counsel at O'Melveny & Myers was engaged in preparation for another trial that would prevent his representation of the Eagles Defendants in the trial in November. Over Felder's vigorous objection, the trial of the consolidated action was continued to September 6, 2006.

REASONS FOR DENYING THE WRIT

I. Petitioners, By Their Litigation Conduct, Unquestionably Waived Their Right To Arbitrate.

The undisputed facts set forth above and summarized by the Court of Appeal in its decision (Appendix 8a-10a) establish that the Eagles Defendants and Azoff waived any right they might have had to arbitrate the claims against them. As the Court of Appeal found, this was not a close case. The Eagles Defendants and Azoff engaged in extensive litigation conduct wholly inconsistent with the right to arbitrate and to the substantial prejudice of Felder.

In reaching its result, the Court of Appeal applied established California law. It cited and relied upon *St. Agnes Medical Center v. PacifiCare of California*, 31 Cal.4th 1187 (2003) (*St. Agnes*). There, the California Supreme Court confirmed the factors to be considered by the trial courts in assessing waiver claims based on litigation conduct: (1) whether the conduct of the parties was inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties were "well into the preparation of a lawsuit" before one party notified the other of its intent to arbitrate; (3) whether a party either requested arbitration close to the trial date or delayed for a long period before seeking a

stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether "important intervening steps" had occurred (such as a party availing itself of discovery not available in arbitration); and (6) whether the delay "affected, misled, or prejudiced" the party opposing arbitration. (*St. Agnes, supra,* 31 Cal.App.4th at 1196, citing *Sobremonte v. Superior Court*, 61 Cal.App.4th 980, 992 (1998)).

The Court of Appeal also relied on its own decision in *Guess?, Inc. v. Superior Court*, 79 Cal.App.4th 553 (2000). In *Guess?, Inc.* the Court of Appeal ordered the issuance of a writ of mandate directing the trial court to vacate its order granting defendant's motion to compel arbitration. The court held that defendant had waived any right to enforce an arbitration clause in an agreement because (1) it knew about the arbitration provision before the lawsuit was even filed; (2) it answered the complaint and did not assert the arbitration clause as a defense; and (3) its other conduct in the lawsuit was "wholly inconsistent with its present desire to arbitrate." (*Id.* at pp. 557-559.)

The Court of Appeal in the instant case determined correctly that Azoff and the Eagles Defendants had waived arbitration based on the clear precedent in *Guess?, Inc.* and *St. Agnes*: "This case presents even a stronger case for waiver than that presented in *Guess?, Inc. supra,* 79 Cal.App.4th 553. Azoff, initially represented by the same counsel representing the Eagles defendants, challenged the pleadings, answered, asserted affirmative defenses without raising the arbitration clause, participated in months of discovery, negotiated and stipulated to the consolidation of actions that had been litigated for over three years, sought and obtained a continuance of the trial date for discovery purposes and to prepare for trial, and